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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALL AMERICAN LIFE AND CASUALTY COMPANY,
an Illinois insurance corporation,
Petitioner,

v.

OCEANIC TRADE ALLIANCE COUNCIL INTERNATIONAL, INC.,
a Michigan corporation, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the divergent decisions of inferior federal courts and this Court's decision in *United States* v. *Abel*, No. 83-935, decided Dec. 10, 1984, 105 S. Ct. 465, regarding the application of Rule 403 of the Federal Rules of Evidence have provided adequate criteria for the exercise of judicial discretion in the admission or exclusion of relevant evidence?

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ALL AMERICAN LIFE AND CASUALTY COMPANY,
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OCEANIC TRADE ALLIANCE COUNCIL
INTERNATIONAL, INC.
a Michigan corporation, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, ALL AMERICAN LIFE AND CASUALTY COMPANY, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 8, 1985.

ADDITIONAL PARTIES TO THE PROCEEDING

Additional parties to the proceeding, all defendants, whose names do not appear in the caption to the case: Howard S. Buhl, Oscar Mezey, Douglas W. Harmon, Olga J. Harmon, Wilson Kassab, Charles Olender, Dean Coffin, Simon Kaplan, Jeryl Marlatt, Richard D. French, Jr., Mat Alfei, John F. Kiley, Robert G. Frear, Executor of the Estate of Stanley B. Willetts, Jr., also known as Guy B. Willetts, Deceased, Robert B. Delaney, Willetts and Associates, Inc., a Michigan corporation, and The French Group, Inc., a Michigan corporation.

OPINIONS BELOW

The opinions below are the opinions of the United States Court of Appeals for the Sixth Circuit, issued March 8, 1985, 756 F. 2d 474 and opinions of the United States District Court for the Eastern District of Michigan (neither of which is pertinent here) issued on May 20, 1983 and July 25, 1983).

JURISDICTION

This is a diversity action. The judgment of the Court of Appeals for the Sixth Circuit was entered on March 8, 1985, and this Petition for a Writ of Certiorari is filed within 90 days of that date. Jurisdiction is conferred upon this Court by Title 18, United States Code, §1254(1).

STATUTORY PROVISION THAT THE CASE INVOLVES RULE 403 OF THE FEDERAL RULES OF EVIDENCE:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

STATEMENT OF THE CASE

(Parenthetical references are to the Joint Appendix filed in the Court of Appeals unless otherwise indicated.)

This is a diversity case between citizens of different states. It deals with the proper administration of justice in the federal courts. Particularly, it deals with whether the declination of this Court to review divergent decisions of the circuit courts and the recent decision of this Court in *United States* v. *Abel*, _____ U.S. _____, 105 S. Ct. 465 (1984), has created an area of law solely governed by trial court fiat rather than by the rule of law.

Placing this issue in proper perspective with the facts and proceedings of this case requires a rather lengthy statement. We hope that some of the tedium of this statement will be relieved by the detective story nature of the facts involved.

The life of Guy B. Willetts (hereafter called Willetts) was insured by All American Life and Casualty Company (hereafter called All American) in the amount of $2,500,000.00. The policy was obtained by Oceanic Trade Alliance Council International, Inc. (hereafter called OTAC), it having paid a one-year premium to cover the period December 27, 1977 to December 27, 1978. OTAC was the sole beneficiary of this insurance, which was so-called "keyman" coverage to insure the worth of the life of Willetts to OTAC (24a, 25a, 30a, 31a, 363a).

The business of OTAC was to conduct a floating trade fair, leasing ship space to exhibitors for showings of wares to prospective purchasers in the oil-rich countries of the Mid-East (632-64a, 99a). Willetts had conceived the idea for this venture (63a-64a) and was the president of OTAC (23a, 30a, 363a).

At the end of the first year for which the insurance on the life of Willetts had been obtained, if no further premium was paid the policy had a cash surrender value which could be claimed by OTAC, or, if not claimed could be used as premium to extend the life of the policy (451a, 75a-76a).

In the fall of 1978, because of extreme unrest in the Mid-East, there was no reasonable possibility of success of the OTAC venture. No exhibitors had agreed to participate in such an exhibition of wares since its inception (Transcript 240) and the only OTAC asset of any worth was the All American policy insuring Willetts which had a cash surrender value of $5,000.00, or which paid a death benefit of $2,500,000.00 (50a, 70a) assuming the policy was in force.

On February 1, 1979, within the period of the policy extended by applying the cash surrender value as premium, Willetts was murdered, being shot by bullets from a .45 caliber automatic hand gun while sitting in a car in front of a restaurant called the Soup Kitchen Saloon located in a warehouse district of Detroit (452a, 261a). Police investigation revealed the murderer to be one Lonnie Thomas, who was hired by one Harold Jackson to commit the murder (OTAC Exhibit 11).

Harold Jackson (hereafter called Jackson) was questioned by officers of the Homicide Bureau of the Detroit Police Department. During this questioning, Jackson entered into an agreement with the Wayne County Prosecutor that immunity would be sought for him upon his making a full, complete and truthful statement and giving testimony as to his part in the murder of Willetts. This agreement was conditioned upon Jackson not being the triggerman in the killing of Willetts and that the idea of killing Willetts did not originate with him (452a, 454a - 456a). In accord with this agreement, immunity for Jackson was sought by the Wayne County Prosecutor and was granted by an order issued by Chief Judge Samuel Gardner of the Recorder's Court for the City of Detroit, the court of general criminal jurisdiction for the City of Detroit (456a).

The statement made by Jackson pursuant to the agreement with the Wayne County Prosecutor related that at the instigation of one John F. Kiley (hereafter called Kiley), a stockholder, vice president and secretary of OTAC, Jackson hired Lonnie Thomas to kill Willetts in order that OTAC could obtain the $2,500,000.00 proceeds of the "keyman" life insurance policy issued by All American. This statement also related that prior to Willetts being killed on February 1, 1979, there had been several abortive attempts made on the life of Willetts pursuant to the Kiley-Jackson conspiracy to murder Willetts and that in one of these attempts, Mat Alfei, stockholder, vice president and treasurer of OTAC, was a participant (OTAC Exhibit 11).

Immediately after Jackson made the statement above described, Kiley, Mat Alfei and Lonnie Thomas were arrested and charged with the murder of Willetts. These persons were the subject of a preliminary examination hearing, following whch they were bound over for trial on charges of first degree murder (308a, 281a).

Prior to trial on the first degree murder charges, the charges against Mat Alfei were dismissed and Lonnie Thomas was allowed to plead guilty to second degree murder and his sentencing was deferred until after the trial of the remaining defendant, Kiley (28a, 31a, 278a(1)). After the trial of Kiley on first degree murder charges, in which Jackson and Lonnie Thomas were principal witnesses, a jury returned a verdict of not guilty and a judgment of acquittal was entered (365a).

On May 2, 1979 All American brought this action in the United States District Court for the Eastern District of Michigan against OTAC seeking to deny death benefits to OTAC because payment of the benefits would be the result of "corporate murder", would result in an unjust enrichment to OTAC, and would be contrary to public policy. OTAC presented a motion for judgment claiming that on the facts alleged All American was not entitled to relief. This motion was granted, and upon reconsideration was denied, but upon the *sua sponte* condition that All American join as parties defendant all of the parties who claimed an interest in the stock of OTAC (37a-39a).

All American filed an Amended Complaint joining, as parties defendant, all of the persons who claimed an interest in the stock of OTAC (40a-41a). These shareholder defendants can be divided into two groups: those who obtained their shares for cash and those who obtained their shares for claimed services rendered to OTAC. The shareholder defendants who received stock for claimed services were Dean Coffin, Kiley, Mat Alfei, Richard D. French and The French Group (formerly known as Richard D. French and Associates), a corporation the stock of which was owned

equally by Kiley, Mat Alfei and Richard D. French. Willetts also received his stock ownership in OTAC for claimed services rendered and his stock interest is represented in this case by the fiduciary of his estate. Robert B. Delaney was joined as a defendant because he claimed an assignment of the shares of Kiley, Mat Alfei, Richard D. French and The French Group. Mr. Delaney is also acting as an attorney for OTAC in this litigation and represented Kiley and Mat Alfei in the criminal proceedings concerning the murder of Willetts.

Prior to trial of all American's claim against OTAC and its shareholders, All American settled with those shareholder defendants who paid cash for their OTAC stock. By this settlement agreement these shareholders ceased to be active in the conduct of this litigation but were not dismissed as parties defendant. The settlement agreement was made known to the trial court and to opposing counsel.

Trial commenced on April 4, 1983. Ground rules as to the conduct of the trial were issued by the District Court, and included directions that the case was to be conducted as if All American was the plaintiff and OTAC was the only party defendant; there was to be no mention of business or social relationships between Jackson and the judge who issued the order granting Jackson immunity, and the case would be submitted to the jury to answer specific fact questions, and not to give a general verdict (48a, 54a-56a).

Considerable of the evidence offered by All American was testimony taken at prior proceedings concerning the murder charges regarding the death of Willetts. This testimony was offered and accepted in accord with Rule 804(b)(1) of the Federal Rules of Evidence because the witnesses were considered unavailable. Jackson was considered unavailable because at a deposition pursuant to a subpoena issued by the Federal District Court in Atlanta, Georgia to bring forth Jackson as a witness in this case, Jackson claimed a Fifth Amendment privilege regarding self-

incrimination and refused to testify. The Federal District Court in Atlanta, Georgia sustained this right to refuse to testify (42a).

Lonnie Thomas was considered unavailable because when brought to the trial from the State Prison of Southern Michigan by a writ of habeas corpus ad testificandum, he refused to answer pertinent questions regarding this litigation that were put to him by counsel for All American by asserting the Fifth Amendment privilege as to self-incrimination, and this assertion by Thomas of his Fifth Amendment privilege was sustained by the trial judge (257a-258a). However, in response to a question put to Lonnie Thomas by counsel for OTAC, Robert B. Delaney, Thomas identified a handwritten narrative contained in a notebook as being in his handwriting (258a).

After the testimony of Lonnie Thomas, taken during the prior criminal proceedings regarding Willetts' murder, was read to the jury[1], counsel for OTAC sought to introduce the written material contained in a notebook that Thomas had identified as being in his handwriting for the purpose of impeaching Thomas. This offer was objected to by counsel for All American and the objection was sustained (284a-285a).

Near the end of the trial day of Friday, April 15, 1983, the trial judge indicated that the handwritten narrative identified by Lonnie Thomas as being in his handwriting, that had previously been ruled inadmissible, appeared to him to have been denied admission in error and that when trial resumed on Wednesday, April 20, 1983 he would again consider admission of this statement into evidence. Counsel for All American were then given copies of this narrative (366a).

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[1] The testimony of Lonnie Thomas related that Kiley told Thomas that he observed Thomas during one of the abortive attempts on the life of Willetts.

Review of this narrative (465a-467a) showed it was purportedly written on October 6, 1982. It contradicted testimony given by Lonnie Thomas at the murder trial that identified Kiley and Mat Alfei at participants in separate, abortive attempts to kill Willetts. It related that during the murder trial of Kiley, Thomas had sought the consultation and aid of a City of Detroit Recorder's Court Judge to whom, according to this narrative, Thomas had told the whole truth.

On Saturday, April 16, 1983, counsel for All American went to the State Prison of Southern Michigan and interviewed Lonnie Thomas. Thomas revealed to counsel that his handwritten narrative which was sought to be introduced in evidence by OTAC was made to Robert B. Delaney, one of OTAC's attorneys, upon Delaney's statement that if Thomas made the statement he would not have to be a witness in this litigation either by deposition or at trial. Thomas identified the judge from whom he sought aid and to whom he told the whole truth as Detroit Recorder's Court Judge Justin Ravitz (376a-377a).

On Monday, April 18, 1983, counsel for All American appeared before Judge Ravitz and inquired as to his recollection of occurrences with Lonnie Thomas about the time of the murder trial of Kiley. Judge Ravitz related to counsel that he had some recollection of occurrences with Lonnie Thomas and believed he had some material that would further refresh his recollection of such occurrences and that after he reviewed this material he would contact counsel for All American (377a). Judge Ravitz reviewed this material, which material, at the time he received it, he had suppressed, and called counsel for All American and reported that he would consider a motion to release the material from suppression (377a-378a).

On Tuesday, April 19, 1983, counsel for All American again appeared before Judge Ravitz, who granted a motion to release the suppressed material (378a, 396a-398a).

The material released from suppression included a photocopy of a handwritten statement, with identifying original signatures of Lonnie Thomas (401a-405a), given to Judge Ravitz by Lonnie Thomas during one of two interviews Judge Ravitz had with Thomas that were reported by court reporters. Among other things, this statement said:

> "Delaney said he would deny it, but he said I must not know who they are or who he is but if I testify in their behalf he would pay me something; and Kiley said if he got off he would pay me $5,000.00 if not his friends would give me 2 or 3 thousand" (405a).

The transcripts of the court reporter reported interviews with Lonnie Thomas by Judge Ravitz, among other things, related that Thomas said:

> ". . . And Kiley comes up to me and sits down and tells me no hard feelings. This and that. I know what your (sic) doing. I figured that they got you in a tight squeeze and all this, you know. But this is the middle game, here, you know. I don't guess they figure—I'm about—to tuff, you know. But this is the middle game. Sits down. No hard feelings, this and that. I know what you're doing. I figured that they got you in a tight squeeze and all this, you know. I know that they're squeezing you, and this and that, you know. I just want you to know that there's no hard feelings. Now they told me that you're going to testify that I offered you money and this and that. And you said that you were going to testify that I told you that I was on the second floor watching you from the building, you know. I'm not saying anything. I'm listening to what he's going to say. Well, I know thats all bull, you know. Because I wasn't even there, you know, this and that.
>
> He's going to sit there and tell me this here. And he—he knows that he done told me this. He knows that he done told me this. He knows that he done told me he was that cat watching me. He knows he offered me the money.

> He done told me what he was going to do. Just like Delaney, you know, he done offered the money and all this kind of stuff." (438a-439a)

When the trial reconvened on Wednesday, April 20, 1983, the matter of admitting the handwritten narrative of Lonnie Thomas given to Mr. Delaney was taken up in chambers (366a). After the trial judge indicated the material would be admitted for the purpose of impeaching Lonnie Thomas (367a), counsel for All American informed the Court that Robert B. Delaney would be called as a witness. Counsel for OTAC immediately asked to be allowed to confer, and, upon completion of the conference, withdrew the evidence they had proposed that, tentatively, had been admitted (368a).

Lonnie Thomas had been brought by All American to the Court lock-up under a writ of habeas corpus ad testificandum on April 20, 1983, pursuant to a petition for this writ filed April 19, 1983, presented and granted by Magistrate Hooe in the absences of the trial judge (21a). When counsel for All American sought to present Thomas as a witness to inquire into the recently discovered statements by Thomas that there had been bribery propositions made to him by Kiley and Robert B. Delaney regarding his testimony (374a-385a), the trial judge labeled the offer of such proof as "asinine" (385a), refused to examine the transcripts of the conversations Lonnie Thomas had with Judge Ravitz (385a-386a), stated that the only purpose of counsel for All American to have such evidence admitted was to smear Mr. Delaney and OTAC (386a-388a), solicited an objection to the offer of this evidence (387a) and denied presentation of Lonnie Thomas as a witness (388a). When counsel for All American offered Thomas as a witness out of the presence of the jury as a matter of fairness of the proceeding (390a-392a) this, also, was rebuffed, the trial judge saying:

> "Well that may be but we are at that stage of the proceeding and the moving finger writes and having writ moves on."

An additional request to have Thomas questioned in the absence of the jury was denied:

> "Mr. Whinham: Before you bring in the jury I again make the request we have the opportunity to question Lonnie Thomas outside the hearing of the jury.
>
> The Court: Bring in the jury." (395a)

The trial proceeded to the submission of the special questions to the jury, which the jury answered by finding that neither Kiley nor Mat Alfei conspired to or caused the murder of Willetts (Transcript 1065). In accord with the jury verdict the District Court ordered entry of judgment upon fewer than all claims on May 20, 1983 (457a-459a). This order gave OTAC a judgment of $2,500,000.00 plus interest.

All American timely claimed an appeal to the United States Court of Appeals for the Sixth Circuit (22a) from the order of May 20, 1983.

On March 8, 1985 the United States Court of Appeals for the Sixth Circuit entered its opinion on the appeal. Relative to whether it was error to deny the presentation of Lonnie Thomas as a witness regarding attempts by Kiley and Robert B. Delaney to bribe Thomas in exchange for favorable testimony, the Court ruled that such evidence would be more prejudicial than probative, and under Rule 403 of the Federal Rules of Evidence such an exclusion of evidence was proper, the matter being "within the sound discretion of the trial court". (Appendix, 12a)

This case was submitted to the Sixth Circuit Court of Appeals by oral argument on September 9, 1984. It should be noted that in all of the submissions by the litigants to the Court of Appeals neither party made any reference to the case of *United States* v. *Abel*, 707 F. 2d 1013 (CA 9, 1983), and that *Abel* in the Court of Appeals had been indexed for digest purposes under headings of "Arrest", "Criminal Law" and "Witnesses". Rule 403 of the Federal Rules of Evidence was not mentioned in the Court of Appeals' opin-

ion in *Abel, supra*, and when this Court granted certiorari in *Abel, supra*, the case was indexed by United States Law Week under the subject matter of "Criminal Law and Procedure", under the sub-category "Impeachment — Witness' membership in society sworn to commit perjury". 53 L.W. 3040.

This Court decided *United States* v. *Abel*, 105 S. Ct. 465 on December 10, 1984. The Sixth Circuit Court of Appeals issued its opinion in our case on March 8, 1985. The foregoing is offered to suggest that the decision of this Court in *United States* v. *Abel, supra*, was not a part of the consideration of the Sixth Circuit Court of Appeals, and to offer an explanation as to why it was not considered.

We believe the ruling of the Court of Appeals for the Sixth Circuit in this case and the rulings of Court of Appeals in many other cases dealing with Rule 403, when combined with this Court's record of declining to grant certiorari in cases which questioned the application of Rule 403, until the decision in *United States* v. *Abel, supra*, has caused a significant area of law, important to the proper administration of justice in the federal courts, to be determined by the rule of man rather than by the rule of law. It is our concern that the decision in *United States* v. *Abel, supra*, may not have provided reasonable criteria to govern the discretion resting in trial judges by Rule 403. As Rule 403 is most broad in application, every case tried in United States courts will be subject to unwarranted limitations to full jury consideration imposed by the rule of man rather than the rule of law.

REASONS FOR GRANTING THE WRIT

THE DIVERGENT APPLICATION OF RULE 403 OF THE FEDERAL RULES OF EVIDENCE BY INFERIOR FEDERAL COURTS AND THIS COURT'S DECLINATION TO REVIEW ANY INFERIOR COURT APPLICATIONS OF RULE 403 UNTIL THE RECENT DECISION OF *UNITED STATES* v. *ABEL*, HAS CREATED UNGOVERNED DISCRETION IN INFERIOR FEDERAL COURTS THAT HAS, IN THIS CASE, ALLOWED FOR EXCLUSION OF RELEVANT, RATIONAL EVIDENCE CONCERNING LITIGANT SOLICITATION OF FALSE TESTIMONY BY BRIBERY.

The Federal Rules of Evidence became operative in 1975, 1, Pub. L. 93-595. Since that time, concerning Rule 403, there have been repeated seekings of the review by this Court regarding decisions which have excluded relevant evidence pursuant to the language of Rule 403,[2]. This rule reads in part:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .".

Until this Court's recent action in *United States* v. *Abel*, ___ U.S. ___ , 105 S. Ct. 465, every seeking of review relative to

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[2] *United States* v. *Renfro*, 620 F. 2d 497 (CA 2, 1980), cert. den. 449 U.S. 921 (1980); *United States* v. *De Fillipo*, 590 F. 2d 1228 (CA 2, 1979), cert. den. 442 U.S. 920 (1979); *United States* v. *Sterling*, 591 F. 2d 708 (CA 2, 1978), cert. den. 439 U.S. 824 (1978); *United States* v. *Palumbo*, 639 F. 2d 123 (CA 3, 1981), cert. den. 454 U.S. 819 (1981); *Fury Imports, Inc.* v. *Shakespeare Co.*, 625 F. 2d 585 (CA 5, 1980), cert. den. 450 U.S. 921 (1981); In re *Beverly Hills Fire Litigation*, 695 F. 2d 207 (CA 6, 1982), cert. den. 103 S. Ct. 2090 (1983); *Harris* v. *Harvey*, 605 F. 2d 330 (CA 7, 1979), cert. den. 445 U.S. 938 (1980); *United States* v. *Briscoe*, 574 F. 2d 406 (CA 8, 1978), cert. den. 499 U.S. 858 (1978); *United States* v. *Hearst*, 563 F. 2d 1331 (CA 9, 1977), cert. den. 435 U.S. 1000 (1978); *United States* v. *Mangeameli*, 668 F. 2d 1172 (CA 10, 1982), cert. den. 456 U.S. 918 (1982); *United States* v. *Castell*, 584 F. 2d 87 (CA 11, 1978), cert. den. 440 U.S. 925 (1979); *United States* v. *Thevis*, 665 F. 2d 616 (CA 11, 1982), cert. den. 456 U.S. 1008 (1982).

application of Rule 403, whether to admit or exclude evidence, had been denied.

We submit that as a result, these repeated denials of review have created an area of law, applicable to every case litigated in United States courts, that is left to unbridled discretion of judges, particularly trial judges, and that the decision in *United States* v. *Abel, supra*, still leaves open the question of whether the admission or exclusion of relevant evidence is resolved, primarily, by the ungoverned exercise of trial court discretion, a caveat early stated by Wright and Graham, *Federal Practice and Procedure*, Evidence §5223.

There are many conflicts as to the application of Rule 403 in the decision of the Courts of Appeals, not only between circuits[3] but within circuits[4]. The trial court discretion allowed by the language of Rule 403 has been used by the Courts of Appeals to justify erroneous decisions excluding evidence, because, even though erroneous, such evidence could have been excluded under Rule 403.[5]

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[3] *United States* v. *Lebovitz*, 669 F. 2d 894 (CA 3, 1980), cert. den. 456 U.S. 929 (1982) (reasons for ruling must be articulated); cert. den. 456 U.S. 929; *United States* v. *Heyward*, 729 F. 2d 297 (CA 4, 1984) (trial court ruling will be overturned only upon extraordinary circumstances); *Ebanks* v. *Great Lakes Dredge and Dock Co.*, 688 F. 2d 716 (CA 11, 1982) (rule is to be used sparingly to rule out relevant evidence), cert. den. 103 S. Ct. 1774; *United States* v. *Masters*, 622 F. 2d 83 (CA 4, 1980) (trial court ruling disturbed only if arbitrary and irrational).

[4] *United States* v. *Jenkins*, 525 F. 2d 819 (CA 6, 1975) (trial court ruling disturbed only if a grave abuse of discretion); *United States* v. *Zipkin*, 729 F. 2d 384 (CA 6, 1984) (Court of Appeals must view evidence most favorably to admission, maximizing probative value and minimizing prejudicial effect).

[5] *Van Alen* v. *Dominick & Dominick, Inc.*, 560 F. 2d 547 (CA 2, 1977); *Renfro Hosiery Mills Co.* v. *National Cash Register Co.*, 552 F. 2d 1061 (CA 4, 1977); *Farace* v. *Independent Fire Insurance Co.*, 699 F. 2d 204 (CA 5, 1983); *Miller* v. *Universal City Studios*, 650 F. 2d 1365 (CA 5, 1981); *Harpring* v. *Continental Oil Co.*, 628 F. 2d 406 (CA 5, 1980); *Pitts* v. *Electro-Static Finishing, Inc.*, 607 F. 2d 799 (CA 9, 1979); *United States* v. *Brannon*, 616 F. 2d 413 (CA 9, 1980).

A student observer reviewing Sixth Circuit decisions concerning application of Rule 403 observed that the decisions ". . . fashioned an analysis which 'rubber stamped' the lower courts [rulings]."[6] United States District Judge William O. Bertelsman, in the Sixth Circuit, in writing a law review article, described Rule 403 as "the trial judges' friend"[7].

The extensive time during which this Court declined to review divergent lower court application of Rule 403 established, as shown above, that Rule 403, the rule applicable to admission of all relevant evidence, would, in practically all instances, be whatever the trial judge stated was the rule.

The decision of this Court in *United States* v. *Abel*, *supra*, poses difficult questions as to whether the circumstances mentioned by this Court in identifying the questioned evidence as relevant, pp 468-470, indicate that questioned evidence should be admitted by the application of Rule 403 unless "unduly" prejudicial, or whether the question of admissibility of evidence is a matter of a trial court's "wide discretion".

> "A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules." *United States* v. *Abel*, *supra*, at p. 470.

We believe that the obligation of this Court to rule on matters where some discretion, particularly at the trial court level, is necessary, is admirably stated by Justice Frankfurter, speaking for the Court in *Brown* v. *Allen*, 344 U.S. 443, 496-497 (1953):

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[6] Survey, Evidentiary Decision Making: Application of the Federal Rules of Evidence in the Sixth Circuit, 12 University of Toledo Law Review, 575, 577. One of the cases surveyed, *United States* v. *Brady*, 595 F. 2d 359 (CA 6, 1979), cert. den. 444 U.S. 862, was cited as case authority by the Court of Appeals in the instant case.

[7] Bertelsman, What You Think You Know (But Probably Don't) About The Federal Rules Of Evidence: A Little Knowledge Can Be A Dangerous Thing, 1981, 8 N. Kentucky Law Review 81, 86.

"Judges dealing with the writ of habeas corpus, as with temporary injunctions, must be left some discretion - room for assessing fact and balancing conflicting considerations of public interest - if law is not to be a Procrustes bed. But discretion must be judicial discretion. It must be subject to rational criteria, by which particular situations may be adjudged. To allow applications for habeas corpus to be denied merely because it is deemed, on no reasonable or, at best, on the most fragile foundations, that the matter has already been adjudicated here, is to afford no criterion, but merely a shelter for district judges to respond according to the individual will.

We must not invite the exercise of judicial impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system'. Cardozo, The Nature of the Judicial Process, 139, 141 (1921). Discretion without a criterion for its exercise is authorization of arbitrariness. The Nation's Supreme Court ought to be able to do better than to tell the Federal Judges of the land, in a field so vital as that of habeas corpus to vindicate constitutional rights, that they may do as they please - that they are not bound, nor to be guided, by considerations capable of rational formulation.

This is not to impugn the conscientiousness of federal judges; if left at large in disposing of applications for a writ of habeas corpus, they would necessarily be thrown back upon their individual judgments, and that would be an exercise not of law but of arbitrariness."

As we view *United States* v. *Abel*, *supra*, we could analyze this Court's identification of the factors of relevancy and prejudice, set forth at pp 468-470, and by analogy point to many factors in our case that make the proffered evidence more relevant and less prejudicial than the evidence allowed jury consideration in *United States* v. *Abel*. For example, while the evidence in *Abel* was admitted because it was relevant to the credibility of a witness whose testimony

was limited to challenging the credibility of an identifying witness, the evidence we seek to have admitted, here would connect one litigant with the wrongdoing charged because it will describe litigant acts that are an admission of the wrongdoing, evidence which is described as "always pertinent" by Wigmore.[8] While the prejudice in *United States* v. *Abel, supra*, connected a criminal defendant with a secret society of felons committed to mutual aid by lying, cheating, stealing and killing, thus creating prejudice by association with others, here, whatever prejudice there might be comes from evidence reporting the acts of a litigant, acts reported by a person in a position to know and recounted to a trusted person of authority, and this evidence can be countered by the testimony of the litigant affected without being in the *Abel* "Catch 22" situation of having a denial of society membership being consistent with the society's evil tenets.

Conversely, we cannot tell whether a denial of admission of the questioned evidence in *Abel, supra*, would have been sustained as within the wide discretion of the district court. Nor can we discern whether the Court's statement relating the weighing process of the district court in *Abel, supra*, at p. 470, when compared with the precipitate ruling by the district court in our case (385a-386a, 390a, 395a), would direct a reversal of the decision of the district court.

We believe that the decision of this Court in *Communist Party of the United States* v. *Subversive Activities Countrol Board*, 351 U.S. 115 (1956) is important in determining the relevance of the questioned evidence, here, because in returning a case for further administrative hearing, it was said (at p. 124):

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts . . . Therefore, fastidious regard for the honor of the administration of

[8] Wigmore, Evidence, Chadbourne Revision, sec. 278.

justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted."

The policy identified with the quotation above is one ingrained in the judicial system and has merited the repeated approval of this Court.[9] To the extent that it allowed admission of evidence from which the jury could delve into possible perjury, *United States* v. *Abel, supra*, is consistent with this policy. Consistent with this policy, when evidence of litigant involvement with the bribery of witnesses is offered, its admission is not to be thwarted by the uncontrolled discretion of trial courts.

Because the Federal Rules of Evidence must be considered in the light of the case law background, it is hard to imagine the prejudice that would "substantially outweigh" evidence of litigant acts seeking to obtain false testimony by bribery. Yet, here, this is what has been accomplished by approving unbridled trial court discretion; a discretion which not only prevented jury consideration, but also ruled out consideration with or without the jury.

What Justice Frankfurter, relying on Justice Cardozo's reasoned observations, said regarding this Court's duty to control the discretionary acts of judges is that this court must establish rational criteria for the exercise of discretion and that this can be done by setting forth guidelines "methodized by analogy, disciplined by system".

We question whether this duty has been fully accomplished by the decision in *United States* v. *Abel, supra*. An analogy limited to one instance of trial court admission of evidence could be made more meaningful by the creation of another analogy concerned with trial court exclusion of evi-

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[9] Cf. *Allen* v. *United States*, 164 U.S. 492 (1896); *NLRB* v. *Indiana and Michigan Electric Co.*, 318 U.S. 9 (1943); *Mesarosh* v. *United States*, 352 U.S. 1 (1956); *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233 (1957); *Clancy* v. *United States*, 365 U.S. 312 (1961); *Saldona* v. *United States*, 365 U.S. 646 (1961).

dence. An approval of a system of weighing relevance and prejudice, including court offers to cushion the prejudice with limiting instructions, can be made more meaningful by an additional review of a case where a precipitate decision excluded evidence.

In short, we suggest that this case be accepted for review because application of Rule 403 has resulted in divergent decisions of the Courts of Appeals regarding the exercise of trial court discretion that has resulted in the trial courts being allowed the exercise of uncontrolled discretion, and that this Court's decision in *United States* v. *Abel, supra,* has not established reasonable criteria for the guided exercise of discretion. We submit that acceptance of this case for review will enable this Court to establish the reasonable criteria that are necessary to make discretion judicial discretion.

If, however, this Court is of the belief that *United States* v. *Abel, supra,* has established reasonable criteria for the exercise of judicial discretion, we ask that the decision of the Court of Appeals be summarily reversed because it was an approval of ungoverned trial court discretion contrary to the analogy and system established by this Court in *United States* v. *Abel, supra.*

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari, or alternatively for a summary reversal of the Sixth Circuit Court of Appeals' decision, should be granted.

Respectfully submitted,

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APPENDIX

No. 83-1440
No. 83-1648
No. 83-1649

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ALL AMERICAN LIFE AND CASUALTY COMPANY,
Plaintiff-Appellant (83-1440),
Plaintiff-Counter-Defendant-Appellee (83-1648/1649),

v.

OCEANIC TRADE ALLIANCE COUNCIL INTERNATIONAL, INC.,
Defendant-Appellee (83-1440),
Defendant-Appellant (83-1648/1649).

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 8, 1985

Before: KEITH and MARTIN, Circuit Judges; and BELL, District Judge.*

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* Hon. Samuel H. Bell, United States District Court for the Northern District of Ohio, sitting by designation.

KEITH, Circuit Judge. This is an appeal, in a diversity case, centering upon a "key man" life insurance policy. The plaintiff, All American Life and Casualty Company, has appealed from a jury verdict and order entering partial final judgment in favor of the defendant, Oceanic Trade Alliance Council International, Inc., in the amount of $2,500,000 plus prejudgment interest and costs. The defendant has cross-appealed the denial of an award of penal interest which the defendant alleges is authorized under a Michigan statute. For the reasons stated below, the judgment of the United States District Court for the Eastern District of Michigan is hereby affirmed.

Oceanic Trade Alliance Council International, Inc., (OTAC) was formed in October 1977, for the purpose of organizing and financing an ocean-going cruise vessel on which American products would be exhibited to prospective purchasers in the Middle East. This concept of a "floating tradeship" was the idea of Stanley B. "Guy" Willetts, an independent businessman with contacts and experience in the Middle East. At the time of incorporation, Mr. Willetts was the chief operating officer and a director of OTAC. The original incorporators, officers and directors of OTAC also included John Kiley, Mat Alfei, and Richard D. French. In return for services to the corporation, common stock was issued to Willetts, Kiley, Alfei, French and a separate corporation known as "Richard D. French & Associates, Inc." or the "French Group" (comprised of Kiley, Alfei and French). Additionally, shares of preferred stock in the corporation were sold to investors for money.

On December 27, 1977, All American Life and Casualty Company (All American) issued to OTAC, as owner, a policy of insurance on the life of Guy Willetts, with a payable death benefit of $2,500,000. The life insurance was known as a "key man" policy, designed to reflect the calculated worth of Mr. Willetts to OTAC. Pursuant to the terms of the insurance policy, the death benefit was to be payable to the

beneficiary, OTAC, immediately upon receipt of proof of the death of Guy Willetts.

On February 1, 1979, Guy Willetts was murdered. At the time of Mr. Willetts' death, the insurance policy on his life issued by All American was in effect. On or about February 3, 1979, John Kiley filed a claim on behalf of OTAC with All American for the proceeds of the life insurance policy. This claim was received by All American on February 8, 1979.

Shortly after Mr. Willetts' death, the Detroit Police Department arrested John Kiley, Mat Alfei, Lonnie Thomas and Harold Jackson in conection with the Willetts murder. Mr. Kiley was charged with first degree murder and conspiracy to commit murder. Mr. Alfei was charged with conspiracy to commit murder. Mr. Thomas, the alleged "hit man," was originally charged with first degree murder. The Wayne County Prosecutor's Office, however, permitted Thomas to plead guilty to a lesser charge of second degree murder in exchange for a promise by Thomas to testify against Kiley. Also, pursuant to an order entered by the Honorable Samuel Gardner, Chief Judge of the City of Detroit Recorder's Court, Mr. Jackson received immunity from prosecution in exchange for an agreement to testify against Kiley, Alfei and Thomas at the murder trial.

Prior to the start of the Willetts murder trial, the conspiracy charges against Mat Alfei were dismissed. Mr. Kiley was tried upon the first degree murder charge and acquitted by a jury.

On or about April 30, 1979, All American filed its complaint in the instant matter seeking to be relieved of the contractual obligation to pay the proceeds of the key man life insurance policy to OTAC. In the complaint, All American admitted "[t]hat [it] has refused to honor the claim of [OTAC] to the policy proceeds because, since the death of Guy B. Willetts was engineered by the stockholders and the remaining living officers of [OTAC], namely, John F. Kiley and Mat Alfei, among others, both of whom dominated the affairs of [OTAC] at the time, [OTAC] would be unjustly

enriched by benefitting from the criminal acts of its officers and agents, all of which acts are chargeable to [OTAC], and that it would be against public policy to allow [OTAC] to recover on said policy for a murder initiated by its officers and agents." Joint Appendix at 27a.

In its answer to the complaint, OTAC denied each element of the alleged "corporate homicide." Additionally, on or about May 18, 1979, OTAC filed its counterclaim, sounding in breach of contract and premised on All American's wrongful refusal to pay the proceeds of the key man insurance policy owned by OTAC on the life of Guy Willetts. In its counterclaim, OTAC demanded the full policy proceeds plus interests, costs and attorney fees. Prior to trial All American had settled with all of the OTAC shareholders who had paid cash for their stock. Under the settlement agreement, All American received an option to acquire all of these shareholders' stock.

The settlement agreement was reviewed by the trial court, *in camera*, and copies of the agreement were furnished to counsel for the shareholders who had not settled. After this settlement agreement became effective, counsel for the settling shareholders ceased to be active in this litigation, although the settling shareholders were never formally dismissed as parties.

Also prior to trial, in response to motions *in limine* and on its own motion, the court established certain ground rules concerning the conduct of the trial. In essence these rules were:

1. The trial was to be conducted as if All American and OTAC were the only litigants.

2. There was to be no mention of the 1982 conviction of Richard D. French, an individual shareholder of OTAC, and president and an equal shareholder with Kiley and Mat Alfei in the French Group, by a federal

court for giving false information to obtain a 1977 loan for the French Group from a national bank.

3. There was to be no mention of the settlement by All American with the shareholders who paid cash for their stock in OTAC.

4. There was to be no mention of any business or social relationship between Harold Jackson, the person who arranged the killing of Willetts, and Chief Judge Samuel Gardner of the Detroit Recorder's Court, the judge who approved the state prosecutor's application for a grant of immunity to Harold Jackson.

The trial commenced on April 4, 1983. The jury was informed of the posture of the active litigants, and that for the purposes of the litigation OTAC was to be considered as if it were the plaintiff seeking the proceeds of the insurance policy from All American, and that All American was to be considered as if it were the defendant asserting an affirmative defense of corporate homicide. While each party bore the burden of proof concerning its claim, the court informed the jury that the insurance policy had been issued, the premium paid and but for All American's affirmative defense, OTAC would be entitled to judgment for the amount of the policy.

Further, in an effort to facilitate the jury's ultimate resolution of the claims presented, the court submitted the following interrogatories to the jury:

Question No. 1: Do you find that Kiley and Alfei conspired to and caused the murder of Willetts?

Put an X in one box or the other. If the answer to Question No. 1 is Yes you will skip to Question No. 4. If the answer to Question No. 1 is No move on to Questions Nos. 2 and 3.

Question No. 2: Do you find that Kiley conspired to and caused the murder of Willetts?

Yes or No.

Question No. 3: Do you find that Alfei conspired to and caused the murder of Willetts?

Yes or No.

If your answers to Questions No. 1, No. 2, and No. 3 are No, you will answer no further questions. If the answer to Question No. 1, No. 2, or No. 3 is Yes you will then move on to Question No. 4. . . .

Question No. 4: Do you find that it was a purpose of such conspiracy to enable OTAC to receive the proceeds of the life insurance policy?

Yes or No.

You will answer Question No. 5 only if your answer to Question No. 4 is Yes.

In Questions No. 5 and 6 the word "conspirators" refers to both Alfei and Kiley or to only one of them, according to your answers to Questions 1, 2 and 3.

Question No. 5: Do you find that such conspirators substantially dominated the business affairs of OTAC?

Yes or No.

You will answer Question No. 6 only if your answer to Question No. 5 is No.

Question No. 6: Do you find that such conspirators were members of a group which substantially dominated the business affairs of OTAC?

Yes or No.

Joint Appendix at 453a- 453a(1).

The jury returned its verdict by answering "No" to Questions 1, 2 and 3. On May 6, 1983, OTAC filed a motion for entry of judgment on this special verdict, seeking the award of the value of the life insurance policy, together with costs, statutory interest, and attorney fees. In the bill of costs and partial calculation of interest submitted, OTAC requested the award of 12% penalty interest pursuant to Michigan Com-

piled Laws Section 500.2006. Additionally, a demand was also made for prejudgment interest pursuant to Michigan Compiled Laws Section 600.6013.

On May 20, 1983, the district court issued an order for entry of judgment upon fewer than all claims. In its order, the trial court determined that OTAC was entitled to judgment against All American in the sum of $2,500,000 plus costs and prejudgment interest pursuant to Section 600.6013. Joint Appendix at 458a. All American filed a notice of appeal from the entry of partial judgment.

In its May 20, 1983 order the trial court had taken under advisement OTAC's motion for penalty interest pursuant to Section 500.2006 of the Michigan Uniform Trade Practices Act. The parties were given thirty days in which to request certification to the Michigan Supreme Court on the issue of whether OTAC was entitled to the penalty interest.

Neither party availed itself of the opportunity to request certification to the Michigan Supreme Court. Consequently, on July 25, 1983, the district court decided that OTAC was not entitled to the 12% statutory penalty interest authorized by Section 500.2006. *See* Joint Appendix 460a- 462a. OTAC filed its cross- appeal from this final judgment.

Upon appeal to this Court the parties have identified five issues to be addressed. In essence, these issues are:

> 1) Whether the trial court committed reversible error by refusing to permit All American Life and Casualty Company to recall Lonnie Thomas in order to have Mr. Thomas testify as to his knowledge of attempts by Attorney Robert Delaney and John Kiley to tamper with Thomas' testimony at Kiley's murder trial;
>
> 2) Whether the trial court committed reversible error by refusing to allow All American Life and Casualty Company to elicit testimony from state prosecutor Timothy Kenny with respect to the participation of the

Honorable Samuel J. Gardner, Chief Judge of the City of Detroit Recorder's Court, in granting immunity from state prosecution to Harold Jackson;

3) Whether the trial court committed reversible error in refusing to admit extrinsic evidence regarding the criminal conviction of Richard D. French, Jr., for the purposes of impeaching witness John Kiley;

4) Whether the trial court committed reversible error in refusing to award OTAC the 12% penalty interest pursuant to Michigan Compiled Laws Section 500.2006;

5) Whether the trial court committed reversible error in ruling that any penalty interest awarded pursuant to Michigan Compiled Laws Section 500.2006 must be set off by any prejudgment interest allowed pursuant to Michigan Compiled Laws Section 600.6013.

We address first the trial court's alleged error in not allowing All American Life to recall Lonnie Thomas in order to have him testify regarding alleged attempts to tamper with his testimony at the Kiley murder trial. During the course of the instant civil trial, All American called Lonnie Thomas as a witness. Mr. Thomas, however, invoked the fifth amendment privilege against self-incrimination and refused to provide any substantive evidence. As a result, All American elected to read into evidence Mr. Thomas' testimony from the Kiley murder trial.

Late in the instant civil trial, All American asked to recall Mr. Thomas in order to impeach him with newly discovered evidence. This newly discovered evidence consisted of the transcript of certain suppressed statements made by Mr. Thomas at *in camera* hearings before Judge Justin Ravitz (not the presiding judge at the murder trial) during the Kiley murder trial. Included in the transcript of these *in camera* hearings were allegations that John Kiley and his attorney (also the attorney for OTAC in the instant trial) Robert

Delaney had attempted to bribe Mr. Thomas in exchange for testimony at the murder trial favorable to Mr. Kiley. In denying the offer of this evidence, the trial judge expressed a concern, among others, that the proffered evidence would be more prejudicial than probative. Joint Appendix at 386a.

Federal Rule of Evidence 403 provides in part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." In construing this rule this Court has consistently held that: "the admission of relevant, potentially prejudicial evidence is placed within the sound discretion of the trial court." *E.g., United States* v. *Brady*, 595 F.2d 359, 361 (6th Cir.), *cert. denied*, 444 U.S. 862 (1979).

From our review of the record in this case, even viewing the proffered evidence in the light most favorable to the proponent, we cannot say that the trial court abused its discretion in excluding this evidence. Accordingly, we find All American's allegation of reversible error with respect to this evidentiary ruling to be without merit.

Next, we address the trial court's alleged error in not allowing All American to examine Assistant Wayne County Prosecutor Timothy Kenny with respect to Judge Gardner's participation in granting Harold Jackson immunity from prosecution for the murder of Guy Willetts. Prior to the trial of the instant matter, All American filed a motion *in limine* seeking to exclude any reference to the fact that Harold Jackson was granted immunity from prosecution for the murder of Guy Willetts by Chief Judge Samuel Gardner of the Detroit Recorder's Court or that Mr. Jackson and Judge Gardner were co-incorporators of a Michigan corporation. Having satisfied itself that there was no suggestion of collusion or other impropriety between Judge Gardner and Mr. Jackson, the trial court granted All American's motion and made it known that

it would find any attempted proof of a business or personal relationship between the two men more prejudicial than probative. *See* Joint Appendix at 48a.

However, during the conduct of the trial, Judge Gardner's name was mentioned by witnesses on three isolated occasions. From our review of the record, this Court believes that counsel for All American, in effect, invited the witnesses to make reference to Judge Gardner. For example, during All American's case-in-chief, Mr. Kiley testified about various proposed real estate deals between the French Group and Mr. Jackson. When asked by OTAC's counsel to identify some of the investors represented by Jackson in these transactions, Mr. Kiley described them generally as "an assistant chief of police" and a "former circuit judge." At this point, All American's counsel interrupted and insisted: "I'm going to have to ask he name names." Whereupon, among others, Mr. Kiley mentioned Judge Gardner's name. Joint Appendix at 117a-118a.

Under the "invited error" doctrine, it is an accepted matter of law that where the injection of allegedly inadmissible evidence is attributable to the action of the party seeking to exclude that evidence, its introduction does not constitute reversible error. *See United States* v. *Lerma*, 657 F.2d 786, 788 (5th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *United States* v. *Martinez*, 604 F.2d 361, 366 (5th Cir. 1979), *cert. denied*, 444 U.S. 1034 (1980). Accordingly, the three scattered references to Judge Gardner cannot, in these circumstances, constitute reversible error.

It must be noted that it was at the request of All American that the pretrial order issued precluding presentation of any evidence which would tend to establish the existence of a personal or business relationship between Judge Gardner and Mr. Jackson. It must also be noted that the trial court consistently enforced this order throughout the course of the trial. *See, e.g.*, Joint Appendix at 353a(1)-353a(6) (excluding from evidence the Articles of Incorporation of the Hannibal Fund Limited). Thus, it was in this context that late in

the trial, the trial judge rebuked All American's counsel for seeking to hold open its rebuttal case in order to have Assistant Wayne County Prosecutor Timothy Kenny testify as to why Judge Gardner was the judge who granted Harold Jackson immunity. Given the context of the requested pretrial order, the consistent rulings excluding such evidence and the three passing references to Judge Gardner which we find to have been invited by counsel, we cannot say the trial court abused its discretion in excluding the proposed line of testimony of Prosecutor Kenny. Accordingly, we find All American's allegation of reversible error with respect to this evidentiary ruling to be without merit.

Next, we address the trial court's alleged error in refusing to allow All American to impeach John Kiley with extrinsic evidence concerning the criminal conviction of Richard French. It appears from the pleadings that prior to trial the district court entered a pretrial order excluding any extrinsic evidence of the 1982 conviction of Richard French for bank fraud. It also appears from the pleadings that the reason underlying this ruling was the trial court's concern that the prejudicial effect of such evidence would outweigh its probative value. *See* Appellee's Brief at 70; Appellant's Reply Brief at 14. During the trial All American's counsel questioned Mr. Kiley about his financial status and a financial statement he had developed in seeking a personal loan in 1977. In discussing the value of his stock in Richard D. French and Associates, the following colloquy occurred:

> Q. So you felt that your interest was worth $224,000, is that right
>
> A. Yes, we did.
>
> Q. That estimate turned out to be inflated, didn't it?
>
> A. At that time that is what we felt our business was worth and I might add the bank had loaned French & Associates a lot of money. The president of the bank had

> been in our office, reviewed records with Mr. French. They were knowledgeable of what they were doing. They didn't loan this money because we were doing nothing.

Joint Appendix at 116a; Appellee's Brief at 58.

Following this colloquy, All American argued that the witness had "opened the door" and, therefore, the court should ignore its pretrial order and allow the introduction of evidence concerning the French conviction. Joint Appendix at 116a-117a. The trial court found All American's argument to be entirely unpersuasive. We agree. As was discussed previously, the admission of potentially prejudicial evidence is placed within the sound discretion of the trial court. On the record before us, we cannot say that the trial court abused its discretion in excluding this evidence. Accordingly, we again find All American's allegation of reversible error to be without merit.

Next, we address the trial court's alleged error in refusing to award OTAC 12% penalty interest pursuant to the Michigan Uniform Trade Practices Act. Section 500.2006 provides, in part:

> Sec. 2006. (1) A person must pay on a timely basis to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice unless the claim is reasonably in dispute.

In construing this statute the trial court stated its belief that an award of penalty interest was appropriate only when the claim is not "reasonably in dispute." The trial court also noted:

> Moreover, the Court is convinced that whether the claim is "reasonably in dispute" is a question for the court to decide. Under any version of the facts as presented at trial of this matter, the Court finds that the issue of corporate homicide in this case rendered the claim reasonably in dispute. If the matter were held to be an issue for the jury, the Court would have directed a verdict upon it.

Joint Appendix at 461a-462a.

In its cross-appeal of the denial of a penalty interest award OTAC essentially makes two arguments. First, OTAC contends that recent cases by the Michigan Court of Appeals construing this statute establish the proposition that an insurer may refuse to pay a claim and not be subjected to this penalty interest sanction "only where the amount of loss or accuracy of the proof of loss is reasonably in dispute." Appellee's Brief at 84. Second, OTAC contends that the penalty interest provision of Section 500.2006 "is identical" in purpose to the penalty interest section of the no fault personal protection insurance benefits provision, Mich. Comp. Laws Ann. § 500.3142. Thus, OTAC argues cases construing the no fault provision are instructive in construing the statute in question. *See* Appellee's Brief at 91, 88-94. Given the specific statutes in question, we do not agree.

With respect to OTAC's latter argument, we do recognize that in a footnote the Michigan Supreme Court did state parenthetically that a "similar purpose [was] intended" between Sections 500.2006 and 500.3142. *See Wood* v. *DAIIE*, 413 MICH. 573, 589 n.17,321 N.W.2d 653 (1982). However, this is hardly sufficient authority to persuade us that the two sections are "identical" in purpose or that a case construing

one section can be utilized indiscriminately to illuminate the construction of the other. More importantly, we note that in the Uniform Trade Practices provision the statute reads: "Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice *unless the claim is reasonably in dispute.*" (emphasis added). Whereas, the No Fault Insurance Act contains no such qualification. *Compare* Mich. Comp. Laws Ann. § 500.2006 *with* Mich. Comp. Laws Ann. § 500-3142.[1] Thus, while similar, the two penalty provisions are not identical and cases construing one statute are not necessarily instructive in interpreting the other.

Similarly, with respect to OTAC's former argument, we also are not persuaded that in utilizing the language "unless the claim is reasonably in dispute," the Michigan Legislature meant to limit the scope of this qualification in the Uniform Trade Practices Act only to situations in which the "amount of loss or accuracy of the proof of loss is reasonably in disute." Admittedly, the two principal decisions of the Michigan courts construing the "reasonably in dispute" proviso of Section 500.2006 have dealt with factual situations in which the amount of loss or the propriety of relying upon a statutorily

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[1] The relevant portion of the Michigan No Fault Insurance Act, Mich. Comp. Laws Ann. § 500.3142, provides:

> Sec. 3142. (1) Personal protection insurance benefits are payable as loss accrues.
>
> (2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.
>
> (3) An overdue payment bears simple interest at the rate of 12% per annum.

invalid contract clause were at issue. *See O.J. Enterprises, Inc.* v. *Insurance Company of North America*, 96 Mich. App. 271, 292 N.W.2d 207 (1980), *leave to appeal denied* 410 Mich 878 (1981); *Siller* v. *Employers Insurance of Wausau*, 123 Mich App. 140, 333 N.W.2d 197 (1983). However, absent greater indication from the Michigan Legislature or courts that such a specialized and restricted reading should be given to this statute, this Court will be guided by the plain common sense meaning of the words.

In ruling upon OTAC's penalty interest argument, the trial court decided that the determination of whether a claim was "reasonably in dispute" was a matter for the court. Further, the trial court found that the issue of corporate homicide raised in this case was sufficient to render the insurance claim a matter reasonably in dispute. We agree. Accordingly, we find the alleged error concerning the denial of OTAC's claim for penalty interest to be without merit.

Last, we address the trial court's alleged error concerning certain language in its opinion to the effect that any penalty interest awarded pursuant to Michigan Compiled Laws Section 500.2006 would have to be reduced by the amount of prejudgment interest allowed pursuant to Michigan Compiled Laws Section 600.6013. Given our decision that OTAC is not entitled to an award of penalty interest, this matter concerning the construction and interrelationship of various Michigan statutes is not properly before this Court for decision. Further, as we read the trial court's memorandum opinion, it appears that the trial court did not definitively rule on this issue. But rather, the court merely suggested hypothetically in dicta that such a result would be appropriate. Our view of this matter is that since this issue is not necessary to the resolution of this case by the federal courts, it is a matter more appropriately left to the Michigan state courts.

Accordingly, we hold that judgment of the Honorable James P. Churchill of the United States District Court for the Eastern District of Michigan is hereby affirmed.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-1440/1648/49

Filed March 8, 1985

ALL AMERICAN LIFE AND CASUALTY COMPANY,
Plaintiff-Appellant (83-1440),
Plaintiff-Counter-Defendant-Appellee (93-1648/1649),

v.

OCEANIC TRADE ALLIANCE COUNCIL INTERNATIONAL, INC.,
Defendant-Appellee (83-1440),
Defendant-Appellant (83-1648/1649).

Before: KEITH and MARTIN, *Circuit Judges;* and BELL, *District Judge.*

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in these cases be and the same is hereby affirmed.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER
OF THE COURT
/s/ John P. Hehman, *Clerk*

Issued as Mandate: April 1, 1985
COSTS: NONE
Filing fee .....$
Printing .....$
Total .....$

A True Copy.
Attest:
/s/ Tom Berrigan
Deputy Clerk

Order for Entry of Judgment
Upon Fewer Than All Claims

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALL AMERICAN LIFE AND CASUALTY COMPANY,
Plaintiff,

v. CIVIL NO. 79-71367

OCEANIC TRADE ALLIANCE COUNCIL INTERNATIONAL, INC.
Defendant.

HOWARD S. BUHL, et al.,
Counter-Plaintiffs,

v.

ALL AMERICAN LIFE AND CASUALTY COMPANY,
Counter-Defendant.

ORDER FOR ENTRY OF JUDGMENT
UPON FEWER THAN ALL CLAIMS
(Entered May 20, 1983)

At a session of said court held in the Federal Building and U.S. Courthouse, Detroit, Michigan, on May 20, 1983.

PRESENT: HONORABLE JAMES P. CHURCHILL
United States District Judge

The pleadings in this case set forth a claim by Oceanic Trade Alliance Council International, Inc. (OTAC) against All American Life and Casualty Company (All American) to proceeds of life insurance in the sum of $2,500,000.00. (The pleadings also framed issues as to alternative dispositions of the proceeds if OTAC is not entitled to the proceeds of the policy.) There is also a claim for interest pursuant to M.C.L.A. § 600.6013.

The pleadings also set forth a claim by OTAC for statutory penalties pursuant to M.C.L.A. § 500.2006. (Amended Notice of Affirmative Defense and Further Answer filed July 8, 1981).

Combining the stipulated facts with the jury verdict, OTAC is entitled to a judgment against All American in the sum of $2,500,000.00 with interest pursuant to M.C.L.A. § 600.6013.

There is an issue as to whether the interest should run from the date of filing of the complaint for declaratory judgment or from the date of filing of the counterclaim on the policy. Although the issue is not perfectly clear, based upon the authority of *Goodwin, Inc.* v. *Orson E. Coe Pontiac, Inc.*, 62 Mich. App. 405 (1975), it is the opinion of the Court that the date of filing of the counterclaim should control the commencement of statutory interest.

Although there is another major issue to be decided, it is the opinion and finding of the Court that there is no just reason for delay in the entry of a judgment for $2,500,000.00 plus statutory interest from the date of filing of the counterclaim, with costs to be taxed. Therefore, pursuant to F.R.Civ.P. 54(b), the Court makes an express direction by this order for the entry of such a judgment.

OTAC's motion for entry of judgment for a twelve percent (12%) penalty pursuant to M.C.L.A. § 500.2006 is taken under advisement. The motion raises complex issues of statutory construction of an ambiguous statute. No decision will be made on the motion for a period of thirty (30) days, which will give either or both parties the opportunity to file a motion for certification to the Michigan Supreme Court pursuant to GCR 1963, 797. The Court could certify the issue upon its own motion but does not deem it appropriate to do so unless at least one interested party deems the issue meritorious of consideration by the Michigan

Supreme Court. If either party shall file a motion for certification, the other party shall file a response thereto within two weeks from the date of filing of such motion. In the absence of a further order by the Court, the issue of whether or not to certify the issue will be made by the court without oral argument, although if such a motion is filed and granted, the Court will invite further input from the parties with respect to the form and manner of presentation of questions.

UNITED STATES DISTRICT JUDGE

Judgment on Fewer than All Claims

(TITLE OF COURT AND CAUSE)

JUDGMENT ON FEWER THAN ALL CLAIMS

(Entered May 20, 1983)

This action came on for trial before the Court and a jury, Honorable James P. Churchill, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, and upon the express direction of the Court, judgment on fewer than all claims, pursuant to F.R.Civ.P. 54(b), is entered in favor of the defendants and counter-plaintiffs and against the plaintiff and counter-defendant ALL AMERICAN LIFE AND CASUALTY COMPANY in the amount of $2,500,000.00, with interest pursuant to M.C.L.A. 600.6013. Interest is to commence on May 24, 1979.

The judgment shall draw interest pursuant to 28 USC 1961 at 8.72 percent.

Dated at Detroit, Michigan, this 20th day of May, 1983.

ROBERT A. MOSSING
CLERK OF THE COURT

By Lillian Brooks, *Deputy Clerk*

Approved:

UNITED STATES DISTRICT JUDGE

(TITLE OF COURT AND CAUSE)

MEMORANDUM OPINION

(Filed July 25, 1983)

In its May 20, 1983 Order for Entry of Judgment upon Fewer Than All Claims, the Court took under advisement the matter of the claim of OCEANIC TRADE ALLIANCE COUNCIL INTERNATIONAL INC. ("OTAC") for a penalty pursuant to M.C.L.A. § 500.2006. Neither party has availed itself of the opportunity to request that the issues be certified to the Michigan Supreme Court pursuant to GCR 1963, 767. Consequently, the Court herewith renders its decision on the issue.

M.C.L.A. § 500.2006 is contained in Chapter 20 of the Insurance Code of 1956 entitled "Unfair and Prohibited Trade Practices and Frauds". The section specifically requires that insurers must pay benefits to an insured under a policy of insurance within sixty (60) days of receipt of satisfactory proof of loss *or* pay twelve percent (12%) per annum interest accruing after such sixty-day period. M.C.L.A. § 500.2006(4). However, other subsections of § 2006 raise ambiguity as to the obligation in subsection (4):

> "(1) A person must pay on a timely basis to its insured . . . directly entitled to benefits . . . or a third party tort claimant the benefits provided under the . . . policy, or, . . . the person must pay to its insured . . . or a third party tort claiming 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice unless the claim is reasonably in dispute.
>
> "(2) A person shall not be found to have committed an unfair trade practice under this section if the person is found liable for a claim pursuant to judgment rendered

by a court of law, and the person pays to its insured . . . or third party tort claimant interest as provided in subsection (4)."

Subsection (4) also distinguishes between claims made by insureds directly and by third party tort claimants and implies, when read without regard for subsections (1) and (2), that if a claim is reasonably in dispute, an insurer will be relieved of its duty of the prompt payment or 12% penalty interest requirement only in a third party claim context.

Given this ambiguity in the statute, the Court looks to Michigan case law construing the statute. Only two reported cases have actually applied the statute's penalty provisions. *O. J. Enterprises* v. *INA*, 96 Mich. App. 271, 292 N.W.2d 207 (1980), *leave den.*, 410 Mich. 878 (1981); and *Siller* v. *Employers Ins., of Wausau*, ___ Mich. ___ , 333 N.W.2d 197 (1983).

O. J. Enterprises involved a claim under a fire insurance policy, the value of which was disputed by the insurer and which was submitted to appraisal pursuant to statute. The trial court denied an award under § 2006 (4), and the Court of Appeals affirmed. It held that the sixty-day period within which the claim was to be paid by the insurer was never triggered inasmuch as the dispute of the amount of the loss rendered the proof of loss not "satisfactory". In so holding, it noted that "[t]he 12 percent rate is a penalty to be assessed only against insurers who procrastinate in paying meritorious claims . . . It is inconceivable that the Michigan Legislature in enacting the two statutes would have intended to penalize insurers for seeking settlement of a disputed claim through the appraisal process.[1] 96 Mich. App. at 274.

In *Siller* the insurer denied benefits on the basis of a clause which was held invalid as not conforming to statutory

[1] The other statute referred to is M.C.L.A. § 500.2032, governing fire insurance policies.

requirements. Upon summary judgment in favor of the insured as to the invalidity of the provision, the trial court awarded the 12% penalty interest of § 2006(4). The Court of appeals affirmed on the grounds that the claim was not "reasonably in dispute" where the only basis for the dispute was a clause which was violative of the statute.

These cases satisfy the Court that an entitlement to penalty interest under § 2006(4) will lie only where the claim is not reasonably in dispute. The ambiguity between the last sentence of subsection (1) and the first sentence of subsection (4) is resolved by construing such a penalty provision strictly, i.e., by requiring a finding of unreasonable conduct preliminary to the imposition of a penalty. 15A Couch on Insurance 2d, § § 58.21 and 58.68. The Court is convinced that the cited cases reflect a similar approach.

Moreover, the Court is convinced that whether the claim is "reasonably in dispute" is a question for the court to decide. Under any version of the facts as presented at trial of this matter, the Court finds that the issue of corporate homicide in this case rendered the claim reasonably in dispute. If the matter were held to be an issue for the jury, the Court would have directed a verdict upon it.

Lastly, even if OTAC were entitled to the 12% penalty, either because the insurer's justification for non-payment is irrelevant thereto or because the facts do not support the Court's conclusion that this claim was reasonably in dispute, any such award would be reduced by the amount of interest awarded in the judgment or payable thereupon by virtue of the last sentence of subsection (4).

An appropriate final judgment will be entered. The judgment will also provide for costs to be taxed against ALL AMERICAN LIFE AND CASUALTY COMPANY by virtue of OTAC's prevailing on the factual issues presented for trial.[2]

JAMES P. CHURCHILL
United States District Judge

Dated: July 25, 1983

[2]The Court notes that costs have already been taxed, apparently without objection.

Final Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALL AMERICAN LIFE AND CASUALTY COMPANY,
Plaintiff,

v. CIVIL NO. 79-71367

OCEANIC TRADE ALLIANCE COUNCIL INTERNATIONAL, INC., et al,
Defendants.

HOWARD S. BUHL, et al.,
Counter-Plaintiffs,

v.

ALL AMERICAN LIFE AND CASUALTY COMPANY,
Counter-Defendant.

FINAL JUDGMENT
(Entered July 25, 1983)

In accordance with the Memorandum Opinion bearing this date;

IT IS ORDERED AND ADJUDGED that the Defendants and Counter-Plaintiffs take nothing on Count II of their counterclaim claim for statutory interest under M.C.L.A. § 500.2006 against the Plaintiff and Counter-Defendant, ALL AMERICAN LIFE AND CASUALTY COMPANY, but that the Defendants and Counter-Plaintiffs recover their costs of the action.

JAMES P. CHURCHILL
United States District Judge

DATED: July 25, 1983